

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-00475

BETWEEN

MATTHEW BAPTISTE

KAREN MOHAMMED-BAPTISTE

CLAIMANTS

AND

SCOTIABANK TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE J. JONES

Appearances:

Mr. F. Scoon for the Claimants

Mr. Morgan instructed by Ms. Hosein for the Defendant

JUDGMENT

1. This action commenced under the 1975 Rules and was converted to the Civil Proceedings Rules (“the CPR”) on the 12th February 2008. Despite the conversion to avoid confusion I shall maintain the nomenclature as used under the 1975 rules.

2. The Plaintiffs, husband and wife, seek to set aside a mortgage whereby they mortgaged their matrimonial home to the Defendant, Scotiabank of Trinidad and Tobago (“the Bank”) on the grounds of undue influence. The basic facts are not in dispute. The

Husband, and not the Wife, was a customer of the Bank at its Couva branch. Sometime in the month of July 2002 the Husband deposited two foreign cheques into his account. A third cheque was deposited in October 2002. In accordance with the Defendant's practice the cheques were held by the Defendant for six weeks pending clearance and the proceeds subsequently deposited into the account of the Husband. Over a period of four months the Husband withdrew the sum of \$98, 000.00 from the account. Nine months after the proceeds of the first cheque was deposited into his account and four months after the proceeds of the third cheque was deposited into his account the Bank informed the Husband that the cheques had been dishonoured. The proceeds of the dishonoured cheques amounted to \$24, 450.00 US.

3. Thereafter the Plaintiffs agreed to borrow from the bank the sum of \$415, 000.00 for the purpose of paying off the monies credited to the Husband's account and liquidating an already existing mortgage on their matrimonial home. The Bank it seems treated the money drawn out of the account by the Husband on the dishonoured cheque as an unauthorised overdraft. As security for the loan the Plaintiffs mortgaged their matrimonial home to the Bank.

4. It is not surprising that the facts in dispute surround the circumstances under which this agreement was made and manner in which the security was taken. There is some suggestion that the arrangement that led to the deposit of the cheques into the Husband's account may not have been entirely above the board. Apart from forming the

background for the Plaintiffs' allegations with respect to unfair advantage and undue influence nothing much turns on this. I make no finding of fact in this regard.

5. It is not in dispute that the Husband and Wife executed a mortgage over the matrimonial home in favour of the Bank on the 30th September 2003 at the offices of the Bank's Attorneys. Nor is it in dispute that from the proceeds of the loan the disbursements made included the sum of \$4, 197.59 to the Husband's savings account, the sum of \$225, 159.34 to liquidate the existing mortgage on the matrimonial home ("the existing mortgage") and the sum of \$173, 027.24 to the Bank to repay the overdraft. The money borrowed attracted an interest rate of 8.99% per annum. At the material times the house was valued at \$400, 000.00. The Plaintiffs made one payment on the mortgage and no more.

6. The Defendant seeks, by way of counterclaim, to enforce the mortgage. As of the 24th November 2005 there was the sum of \$490, 809.01 due on the mortgage with interest accruing at the rate of \$97.84 a day. As of the 13th November 2008: on the sum of \$225,159.34 paid to the mortgage company to liquidate the existing mortgage, after applying the one instalment, the sum of \$224, 064.75 remains due together with the sum of \$100, 937.00 representing the interest due and owing on the said sum which interest continues to accrue at a daily rate of \$55.18. With respect to the balance borrowed the amount owing is \$189, 840.66 together with the sum of \$87, 390.73 representing interest due and owing on that sum which interest continues to accrue at a daily rate of \$46.76.

7. The Plaintiffs concede that there is no valid challenge to that part of the mortgage that secures the loan to repay the existing mortgage. If the Plaintiffs succeed therefore it is only in respect to that part of the mortgage that on the 13th November 2008 secured the sum of \$189, 840.00 together with interest of \$87, 390.73. In practical terms therefore whatever my decision it is not disputed that the Bank will be entitled to put the house up for sale to recover the sum of \$326,097.19 together with interest accruing at a rate of \$55.18 from the 13th November 2008

8. Against this background it is instrumental to examine the pleadings with respect to the dispute of facts and the case as pleaded. With respect to the circumstances under which the parties entered into the agreement with the bank, by their pleadings the Plaintiffs aver that at all material times the Bank acted through Mr. Neil Siewasaran who was at that time the acting manager of the Branch. It is also instrumental to note that at all times, except in the paragraphs specifically referred to later both Plaintiffs presented the same defence.

9. The Plaintiffs allege that Mr. Siewasaran:

- (i) On or around the 14th May 2003 threatened the Husband with criminal prosecution by the fraud squad in respect of returned cheques and demanded information from the Husband as to any property he owned;
- (ii) On or about the 21st May 2003 proposed to the Husband that the Bank liquidate the existing mortgage loan and take a larger loan to liquidate the

existing mortgage and the monies outstanding as a result of the dishonoured cheque;

- (iii) On the 30th September 2003 requested of the Husband that he and his Wife attend Attorney's offices for the purpose of executing a mortgage.

According to the pleading this request was communicated to the Wife by the Husband and they both attended the offices and executed the mortgage in favour of the Bank.

10. By their paragraphs 12 and 13 the Plaintiffs plead:

“12. The Plaintiffs signed the Memorandum of Mortgage under duress and undue influence and the Second Named Plaintiff, in particular did so without reading same and without obtaining legal advice, as a married woman. The Second Named Plaintiff knew nothing about the transaction, but only executed same, since she was advised that her Husband would go to jail if she did not sign the Memorandum of Mortgage.

13. In the premises, unfair advantage was taken of both Plaintiffs by the Manager of the branch.

PARTICULARS

- (a) The Defendant dealt solely with the First Named Plaintiff.

- (b) The nature of the document was never explained to the Second Named Plaintiff nor was she advised to consult Attorneys before signing the said mortgage.
- (c) The Bank well knew that the Plaintiffs were husband and wife and the Second Named Plaintiff was to agree to carry the additional burden of \$170, 000.00 allegedly due to the Branch on account of the alleged indebtedness of the First Named Plaintiff.
- (d) The Second Named Defendant avers that she had no interest on either of the said accounts of the First Named Plaintiff nor did she have any dealings with the Defendant or the Branch and avers that she is the owner of the matrimonial home together with the First Named Plaintiff as joint tenants and contends that neither the interest of the First Named Plaintiff nor herself has been severed from the joint tenancy, in respect whereof the matrimonial home is held.”

11. Pursuant to a request for further and better particulars the Plaintiffs confirm that the allegations of improper behaviour were made against Mr. Neil Seiwsarran. In particular under paragraph 12 in answer to the request for particulars of the alleged duress and undue influence and the alleged advice to the Second Plaintiff the Plaintiffs state:

“On 30th September 2003 the Second Named Plaintiff received a call from Neil Seiwsaran who informed the Second Named Plaintiff to go to Messrs. JD

Sellier & Co. At JD Sellier the Second Named Plaintiff was crying as she was confused. Both Plaintiffs left JD Sellier at 4:30 pm and were required to go to Scotiabank, Couva. The Plaintiffs arrived at the Bank at 5.55 pm and were requested by the said Neil Siewarran to sign a loan application form, but the Plaintiffs at first refused so to do since they had already executed the mortgage at JD Sellier & Co. The said Neil Siewarran insisted that the loan application be signed by the Plaintiffs since he had threatened them that should they fail to do so the First Named Plaintiff would be incarcerated”

12. On the pleadings therefore the case for the Plaintiffs was that undue influence had been exercised over both Plaintiffs by Neil Siewarran. With respect to the Husband it was as a result of the threat of prosecution made on the 14th, 21st of May and 30th September 2003. With respect to the Wife it was as a result of the actions of the said Neil Siewarran on the 30th September 2003.

13. The Bank on the other hand denied the threats. According to the Defence the Husband said that he had a good name with the Bank prior to the incident and he wished to apply for a loan in order to pay off the debt using the property as collateral. With respect to the Wife the Bank pleads that both Plaintiffs signed a loan application form on or about the 13th May 2003; that the Wife provided a job letter dated the 3rd June 2003 and that she was fully aware of the nature of the mortgage and her legal obligations in executing same and there was no need to have it read out or explained to her.

14. By the time this matter came up for trial the Plaintiffs had changed their Attorneys. Notice of the change was filed days before the date of the trial. Unfortunately for the Plaintiffs and their new Attorney, the matter having already been converted to the CPR, it was now much too late to amend their pleadings. In any event no permission was sought to have the pleadings amended.

15. At trial it was conceded by the Plaintiffs that on the law there was no issue as to undue influence exercised by the Bank over the Husband. The case for the Plaintiffs as presented at trial rested solely on the exercise of undue influence over the Wife by the Bank and by the Husband as agent for the Bank. With respect to the latter aspect it was clear that this was a departure from the case as pleaded. In this regard the Bank objected to the attempt by the Plaintiffs to change the case as presented on the pleadings. While Attorney for the Bank was successful in preventing facts contrary to the case as pleaded being presented by the Plaintiffs there were certain of the facts common to the case as pleaded and the new case as presented.

16. The Bank submits that the Court ought to disregard the new case presented by the Wife and determine the matter solely on the case presented by the pleadings. In this regard it submits that with respect to the Husband, even if the Court were to find that there was a threat to prosecute, the case presented by the Husband cannot survive because a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt that he justly owes his creditor. With respect to the Wife the Bank submits that on the pleadings she alleges undue influence by Mr. Seiwarran but has led

no evidence with respect to any interaction between Mr. Seiwsarran and herself. As a result the Bank submits the Plaintiffs case fails to get off the ground.

17. It seems to me that while, in law, the submissions of the Bank may be on solid ground the Wife's appeal is in this case to the equitable jurisdiction of the Court. In these circumstances it seems that the Court ought to consider the new case as presented. That said, it would seem to me however, on an examination of the facts the change in the case may have some bearing on the credibility of the Wife.

18. Given the case now presented by the Plaintiffs it is necessary to examine the evidence of the Wife in some detail. The Wife describes herself as a cosmetologist. Her evidence is that from 1999 to 2007 she worked at a Montessori school. Since January 2007 she operates a hairdressing salon from the matrimonial home. According to the Wife sometime in August 2003 she was told by her husband that he had arranged a meeting with his bankers the following day and that he needed her to attend. She says that he did not explain the details of the meeting but said that the bank officials would explain.

19. She attended meeting with a Mr. Coehlo, a loans officer. Mr. Coehlo told her that the reason that she was there was because he wanted to help her Husband. He recited the facts leading up to the cheques being bounced by the Bank and advised her that the cheques amounted to some \$170, 000.00. He also told her that he would let her know when and where to go to sign any documents. It must be noted here that there was an

attempt by the Wife to say quite a lot of things about Mr. Coehlo. The Bank quite properly, in my view, objected to this evidence on the ground that it was a departure from the case as pleaded and further that the witness statement of the Wife was served outside of the time for its service and without the permission of the Court which permission was only sought at trial. While the Wife was allowed to give evidence by her witness statement the evidence was not allowed.

20. According to the Wife about one or two weeks afterwards she got a telephone call from Mr. Coehlo saying that they needed to come in to collect a cheque to take to the Company with whom they had the existing mortgage (“the mortgage company”). According to her Mr. Coehlo told her that they must work fast. She says that her Husband collected the cheque and as far as she knew took it to the mortgage company.

21. On the morning of the 30th September, the Wife says, she received a telephone call at around 9:00 a.m. from Mr. Coehlo who told her that they were to go to the lawyer’s office by 3.00 o’clock that afternoon to sign some documents. They ran late for the appointment and got there at about 4:05 pm. When they arrived they called and let Mr. Coehlo know that they had arrived. According to her he told her that they must sign the documents that day. While they were at the lawyer’s office they received about 3 to 4 telephone calls from Mr. Coehlo telling them that they had to come to the bank afterwards to sign some more documents.

22. They went to the bank after signing the mortgage. They arrived at about 5.55 p.m. The bank had by that time already closed for business. They were immediately ushered into Mr. Coehlo's office where they were presented with some documents to sign. It is not in dispute that these documents were the letter of offer-loan agreement, the group creditor life insurance enrolment form, the consumer credit disclosure statement and the letter of disbursement.

23. The evidence of the Wife therefore makes no allegations of any undue influence or improper behaviour on the part of the Husband. Her evidence against the Bank is to the effect that:

- (i) She was told, sometime in or after August, that in order to help her Husband she had to do certain things which involved the signing of documents.
- (ii) About two or three weeks afterwards she was told by the bank that they needed to come in to collect a cheque and that they had to move fast.
- (iii) On the 30th September she was advised that they had to go to sign the documents that afternoon.
- (iv) While at the lawyer's office the Bank official called them at least three times.
- (v) After signing the mortgage documents at the lawyer's office they went to the Bank after the close of business where they signed further documents.

24. In assessing the Wife's evidence it is instrumental to note that the Husband's evidence and the pleadings and the other evidence in this regard. Firstly it is clear from the documents in evidence that the cheque to liquidate the existing mortgage was forwarded to the mortgage company by the Bank's Attorneys by letter dated the 30th September 2003 and not given to the Husband prior to the execution as suggested by the Wife. Further according to the Husband's evidence his discussions initially were with Mr. Seiwssaran. These discussions were in or around the month of May. According to him it was Mr. Siewssarran made the threats and who proposed the solution. After this was done Mr. Seiwssarran sent him to Mr Coehlo. He says Mr. Coehlo met him on the first occasion and "on a few occasions thereafter and then met with my wife and I on a few occasions. During one of the times when I met with Mr. Coehlo he took information from me about my personal and financial affairs. He wrote this information down on a form that he had on his desk." This is the extent of the evidence of the Husband with respect to those matters stated by his Wife.

25. According to the pleadings all interaction was with Mr. Seiwssarran acting on behalf of the Bank. In particular, contrary to her evidence, the impression given by the pleadings that the first time the Wife became involved was when she was told by her Husband on the 30th September that they were to attend the lawyers offices that day to execute the mortgage.

26. Further and in my mind significant in the assessment of the credibility of the Wife and the new case as presented is that at no time in the proceedings even up to trial does

the Wife seek to separate her case from that of her Husband. Indeed at all times the case was presented on behalf of both Plaintiffs. This fact in my opinion makes the contradictions between the evidence of the Plaintiffs and the omissions in the Husband's evidence assume even more significance with respect to the credibility of the Wife.

27. The Plaintiffs submit that the evidence of Mr. Coehlo is significant to the case as presented. Mr. Coehlo says that he received instructions from Mr. Siewsarrran to arrange an appointment with Mr. and Mrs. Baptiste to prepare an application for a loan to cover the \$173, 024.00 overdraft using the Husband's residential property as security. He knew of the background to the loan. He contacted Mr. Baptiste to arrange an appointment for him and his wife to come into meet with him to complete the loan application form. As the result of the Husband's relationship with the Bank he was able to start the paper work on the loan account, this paper work included the loan application form. He was also able to engage the services of a valuator to value the home.

28. According to Mr. Coehlo he met with the Plaintiffs on the 3rd June 2003. At that time he says he suggested that the Plaintiffs consolidate their mortgage debt with the proposed loan into a new loan from the bank as opposed to attempting to have the overdraft facility converted into an unsecured loan. He says he pointed out to them the fact that the interest on the unsecured loan was 28.3% for a maximum of 5 years while if the consolidated loan were to be secured by the home it would only attract 8.99% interest for 30 years with the option to make bulk payments. The Plaintiffs, he said, opted for the secured loan and completed and signed the loan application form. The date 13th May

2003 on the form is the original date inserted by him when he had begun to fill out the loan earlier.

29. With respect to the 30th September he says that they all wanted to close that day as it was the last day of the month and arrangements had already been made with the mortgage company to settle the sum outstanding on that date to avoid the Plaintiffs having to pay further interest. He says that the Plaintiffs met with both him and Mr. Seiwarran on the 30th. He says he explained all the key points of the documents and the Plaintiffs signed in the presence of both him and the manager. He says that he dealt with the Plaintiffs face to face and over the telephone over many months. At no time did they ever indicate that they were under duress nor that the Husband had been threatened with criminal prosecution nor did they express any objection to either the loan or the mortgage.

30. The Plaintiffs concede that their case rests solely on the proposition in law that the Husband acted as the agent for the Bank in the transaction. The problem is that there is no evidence from the Wife of any threats or pressure brought to bear on her by her Husband or the Bank. There is no allegation by her of any improper behaviour on the part of her Husband. In addition, and in my view this goes to the bona fides of the case presented as well as to her credibility, at no time does the Wife seek to distance herself from her Husband. Not in the pleading not in her witness statement. In this regard the contradictions and /or lack of corroboration in the evidence of the Husband is in my view of great significance with respect to the bona fides of the case as presented.

31. The Plaintiffs submit that the Wife at least is entitled to some relief on the basis of the following facts:

- (1) The transaction was clearly not to her benefit;
- (2) The Bank wanted the transaction completed to correct the problem;
- (3) The Bank proposed the transaction;
- (4) The Bank knew that the property was the Plaintiffs' matrimonial home;
- (5) The Bank made the arrangements with respect to the preparation and execution of the mortgage deed;
- (6) The Husband got the Wife to agree to the transaction;
- (7) The Wife did not read the documents.

32. With respect to these facts the Bank concedes that:

- (i) It wanted the transaction completed to correct the problem;
- (ii) It knew that the property was the Plaintiffs' matrimonial home and
- (iii) It made the arrangements for the execution of the mortgage.

33. It is clear to me that the transaction was not to the Wife's benefit. However in this regard I must bear in mind that despite this the Wife did receive a benefit from the transaction in that the existing mortgage was paid off albeit in circumstances where the repayment was on terms more onerous than the original arrangement. On the other hand no payments were made on either mortgage since November 2003. There is no evidence that the Husband got the Wife to agree to the transaction but it is equally clear that someone must have gotten the Wife to agree. The Bank says it was not it. I am prepared

to accept that in those circumstances it must have been the Husband. The Bank says that the Husband proposed the transaction. On a consideration of the evidence on the whole I do not accept the Bank's evidence in this regard. I find that it is more probable that it was the Bank that proposed the transaction and not the Husband. While there is no evidence that the Wife did not read over the documents. Neither is there any evidence that the Attorneys preparing and taking the execution of the deed acted improperly in any way. Given the manner in which the evidence as to the execution was originally presented and the subsequent striking out of that evidence I am prepared however to give the Wife the benefit of the doubt. I am prepared to deal with the case on the basis that the deed was presented to the Wife but she declined to read it.

The Law

34. The real issue here is whether equity will step in and protect the interest of the Wife in these circumstances.

35. There is no issue between the parties that insofar as the new case presented is concerned the judgment of the House of Lords in the **Royal Bank of Scotland Plc v Etridge (No 2) [2002] 2 AC 773** is of utmost relevance. The Plaintiffs also rely on the case of **First National Bank plc v Achampong and Others [2003] EWCA Civ.487**. Also of relevance in my opinion, if only for the purpose of showing the development of the law, is the case of **Barclays Bank Plc v O'Brien [1993] 3WLR 786**.

36. With respect to O'Brien's case it is sufficient for our purposes to recite from the headnote to the case which in my view accurately reflects the decision of the Law Lords.

“ Held, dismissing the appeal, that here was no basis for providing special protection in equity to wives in relation to surety transactions; but that where a wife had been induced to stand as surety for her husband's debt by his undue influence, misrepresentation or some other legal wrong, she had an equity as against him to set aside that transaction; that on ordinary principles the wife's right to set aside the transaction would be enforceable against a third party who had actual or constructive notice of the circumstances giving rise to her equity or for whom the husband was acting as agent; that when a wife offered to stand surety for her husband's debt in a transaction which was not to her financial advantage and which carried a substantial risk of the husband committing a legal and equitable wrong entitling the wife to set aside the transaction, the creditor was put on inquiry and would have constructive notice of the wife's rights unless he took reasonable steps to ensure that her agreement to stand surety had been properly obtained; that, in the circumstances the bank was fixed with constructive notice of the wrongful misrepresentation made by the husband to the wife; and that the wife was entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank.”

37. It is the principle expressed in this case that forms the basis for the Plaintiffs' submission that the Husband acted as agent for the Bank in the instant case and that in

not ensuring that the Wife's agreement to mortgage her interest in the matrimonial home had been properly obtained the Bank acted improperly. Unfortunately for the Plaintiffs I do not accept the submission.

38. In the first place whether or not the Bank acted improperly or imprudently is not the issue in this case. In my view improper or imprudent action by the Bank does not necessarily form the basis for setting aside a transaction which is on the face of it valid. It may very well be that in the instant case in not ensuring that the Wife had independent legal advice the Bank did act imprudently but the question is whether that fact coupled with the fact that the transaction was not to her benefit entitles the Wife to the relief sought. In my opinion it does not. In the absence of any evidence of undue influence exercised on the Wife by the Bank the Wife must prove that the Bank had constructive notice of improper behaviour amounting to a misrepresentation or exercise of undue influence over her by the Husband who in those circumstances would be considered the agent of the Bank for the purpose of procuring the Wife's consent. The problem in the instant case is that there is no allegation by the Wife of any improper behaviour on the part of the Husband.

39. That this is the position is in my view confirmed by the Eldridge case. The Plaintiffs rely on the statement in the headnote that reads: "If [the Wife] was able on the facts of the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not explicable in the ordinary way she could rely on the presumption which as an

evidential forensic tool shifted the burden of proof to her opponent and could be rebutted on appropriate evidence by that party.” The problem with that submission is that it fails to consider the rest of the paragraph which goes on to state: “Since the fortunes of husband and wife were ordinarily bound up together, a guarantee given by a wife with a charge on her interest in the matrimonial home to secure her husband’s debts was not plainly to her disadvantage so as to be explicable only on the basis that the transaction had been procured by his undue influence.”

40. In my opinion the cases establish that in order to succeed in the case of undue influence the Wife would have to show that:

1. The transaction was one not to her benefit but to the benefit of her Husband;
2. She entered into the transaction by virtue of the exercise of undue influence over her by the Bank or her Husband;
3. If the influence is alleged to have been by the Husband then the Wife must show actual undue influence or, if there is evidence that she placed trust and confidence in the Husband in the management of her financial affairs and the transaction is not explainable as being consistent with the ordinary affairs of a husband and wife then there is a presumption of the exercise of undue influence by the Husband over the Wife. In those circumstances for the Bank to enforce the transaction to rebut the presumption it would have to show that it took all reasonable steps, including ensuring that the Wife received independent legal advice, to

inform the Wife of the true nature of the transaction and to satisfy itself that her participation was informed and voluntary.

41. In the instant case while it is clear that the transaction was not one to the benefit of the Wife. In my opinion there is no evidence or actual undue influence exercised by the Husband over the Wife. There is no evidence that in the management of her financial affairs the Wife placed trust and confidence in the Husband. Further there is nothing to suggest that the Wife's involvement in the transaction was anything other than pursuant to the usual support given by a wife to a husband. To my mind the manner in which the case was pleaded and the fact that the case continued to be presented to judgment on behalf of both the Husband and Wife by the same Attorney, supports this the position.

Dated this 15th day of December, 2008.

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Judith A. D. Jones
Judge